

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Adopt
Regulations for Automatic Vehicle
Monitoring Systems

Small Business Size Standards

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PR Docket No. 93-61
FCC 99-2

COMMENTS

Comtrak, by its attorneys and pursuant to Sections 1.415 and 1.419¹ of the Federal Communications Commission's (the "FCC" or "Commission") rules, respectfully submits its Comments in response to the Commission's request for comment on the small business size standards adopted for the impending location and monitoring services ("LMS") auction.² Comtrak supports the Commission's small business size standards adopted in its *LMS Second R&O*³ and asks the Small Business Administration to quickly approve them.

I. The Commission's Small Business Standards Are Appropriate

In the *LMS Second R&O*, the Commission adopted incentives that are intended to encourage small businesses to participate in the LMS auction. More specifically, the Commission established that "small businesses" with average gross revenues not exceeding

¹ 47 C.F.R. §§ 1.415 & 1.419.

² *Comment Sought of Small Business Size Standards*, Public Notice, FCC 99-2 (released January 13, 1999).

³ *In the Matter of Amendment to Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, 13 FCC Rcd 15182, *Second Report and Order*, PR Docket No. 93-61 (released July 14, 1998).

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III. Conclusion

Comtrak believes that the recommendations presented in these Comments are consistent with Congress' goals regarding the allocation of spectrum. Its recommendations will also ensure the positive treatment of small businesses in the LMS auction.

Respectfully submitted,

COMTRAK



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January 20, 1999

Its Attorneys

Before the
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Washington, D.C. 20554

In the Matter of)
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PR Docket No. 93-61

To the Commission:

COMMENTS OF COMTRAK

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November 5, 1997

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
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Amendment of Part 90 of the)	PR Docket No. 93-61
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Monitoring Systems)	

To the Commission:

COMMENTS

Comtrak, by its attorneys and pursuant to Sections 1.415 and 1.419¹ of the Federal Communications Commission's (the "FCC" or "Commission") rules, respectfully submits its Comments in response to the above-entitled Further Notice of Proposed Rulemaking (the "*Notice*").² Comtrak supports the Commission's proposal to adopt competitive bidding rules that will govern the allocation of spectrum for multilateration location and monitoring services ("LMS").³ In addition, Comtrak takes this opportunity to address more fully certain aspects of the Commission's proposals.

I. Introduction

Comtrak is an equipment manufacturer that has been involved in location technology as a supplier of sophisticated radio frequency location systems to the U.S. government and, more

¹ 47 C.F.R. §§ 1.415 & 1.419.

² *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, PR Docket No. 93-61 (released Sept. 16, 1997).

³ *Notice* ¶ 72.

recently, to commercial ventures. Comtrak intends to be involved in the provisioning of LMS services, either individually or through partnerships with other businesses, and will require access to LMS spectrum in order to meet this business objective. As Comtrak will be affected by the competitive bidding procedures adopted by the Commission pursuant to this rulemaking, it has a significant interest in participating in this proceeding.

II. Comtrak Supports The Use Of The General Competitive Bidding Rules Being Developed By The FCC

Comtrak supports the FCC's use of the auction rules promulgated in the competitive bidding proceeding⁴ as a means for allocating LMS spectrum. However, to the extent that the comments and reply comments filed in this rulemaking suggest auction rules that better reflect the unique characteristics of LMS, it is within the FCC's authority and in the public interest for the Commission to follow a modified set of auction rules to allocate LMS spectrum.

In addition, the Commission must expedite the release of the general auction rules so as to minimize any further delay of the LMS auction. The LMS auction has been delayed for nearly three years. During this time, incumbent licensees have been given the opportunity to establish a competitive foothold in several critical markets while other interested companies, such as Comtrak, have been forced to wait on the Commission's actions. Development of the LMS industry cannot occur until the FCC makes LMS spectrum available to all interested parties. Comtrak, therefore, urges the Commission to eliminate the last roadblock to LMS spectrum auctions by quickly releasing its general auction rules.

⁴ *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding*, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 12 FCC Rcd 5686 (1997).

III. Comtrak Supports The Use Of Simultaneous Multiple Round Bidding

The Commission has proposed the use of simultaneous multiple round bidding.⁵

Comtrak supports the use of this auction methodology. Simultaneous multiple round bidding offers an efficient means for conducting the LMS auction, and thus should help keep the costs associated with participating in the auction as low as possible. In addition, Comtrak agrees with the Commission's statement that simultaneous multiple round bidding will give the LMS auction participants the ability to secure information that will help them to value the available spectrum and to shape their bidding strategy accordingly.⁶ The FCC, therefore, should adopt this methodology in the LMS auction.

IV. The FCC Should Incorporate Small Business Incentives Into Its LMS Auction Rules

The Commission has requested comment on whether it should institute incentives to encourage small businesses to participate in the upcoming LMS auction.⁷ Comtrak urges the Commission to adopt such incentives.

Congress and the Commission have recognized that the telecommunications market is enriched when there is diversity in the suppliers of telecommunications services. Small businesses represent a critical means for creating such diversity. In recognition of the important role to be played by small businesses in the telecommunications market, Congress included provisions in the Telecommunications Act of 1996 (the "1996 Act") that specifically addressed the need for the FCC to establish regulations that allow small businesses to

⁵ Notice ¶ 74.

⁶ *Id.*

⁷ *Id.* ¶ 75.

participate meaningfully in the marketplace.⁸ Since the passage of the 1996 Act, the FCC has followed Congress's mandate by implementing rules that identify and eliminate market entry barriers and increase the telecommunications opportunities available to small businesses.⁹

Comtrak believes that the LMS market will be strengthened by the presence of a variety of service providers that include small business entities. Furthermore, it would be consistent with congressional intent and the FCC's past precedent to adopt incentives that would specifically encourage small businesses to offer LMS. Therefore, Comtrak has set forth below a set of proposals that it believes will aid the Commission in ensuring that small businesses participate in the upcoming LMS spectrum auction.

A. The FCC Should Adopt Two Categories Of Small Businesses That Will Be Eligible For Small Business Incentives In The LMS Auction

Comtrak recommends that the FCC adopt two small business categories in the LMS auction. The first is the small business category. To qualify for the small business incentives, a business must have average gross revenues of over \$3 million up to \$10 million. The second category covers very small businesses with average gross revenues of \$3 million or less.

For purposes of LMS, Comtrak recommends that the FCC define a small business based on the gross revenues of the applicant for the three years preceding the filing of the entity's auction application. Comtrak has reviewed the FCC's precedent in this area and believes the use of three-year data is appropriate. Where an entity has not been in existence for three years, the entity should be allowed to submit evidence of its gross revenues for the

⁸ See, e.g., 47 U.S.C. § 257 (instructing the FCC to identify and eliminate barriers to entry for small businesses interested in participating in the telecommunications market).

⁹ See, e.g., *In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, 7 Comm. Reg. (P & F) 1112, ¶ 8 (1997) (noting that the FCC has adopted licensing incentives to encourage small business participation in spectrum auctions).

period of time that it has existed. Evidence of an entity's gross revenues should be in the form of audited financial statements. However, small businesses should be allowed to rely on unaudited financial statements when audited statements are not available, so long as the Chief Financial Officer of the applicant certifies as to the accuracy of the unaudited statements.

In addition, Comtrak requests that the Commission explicitly clarify that it will rely solely on gross revenues, not the number of employees, to determine an entity's eligibility to participate as a small business in the LMS auctions. In Appendices B and C of the *Notice*, the Commission discusses the number of small businesses that may be affected by the rules promulgated pursuant to this rulemaking.¹⁰ In its discussion, the FCC states that it believes that most of the LMS licensees will be "small businesses" under the Small Business Administration's ("SBA") definition applicable to radiotelephone companies.¹¹ Comtrak urges the FCC to avoid using the SBA definition of a small business. Instead, the Commission should follow its precedent and, as it has done in previous auctions, rely on gross revenues for purposes of determining an entity's eligibility for small business incentives in the LMS auction.

B. Bidding Credits Should Be Granted To Small Business Participants In The LMS Auction

Comtrak recommends that bidding credits be offered to small businesses in order to encourage their participation in the LMS auction. Bidding credits have become an important small business incentive because they help offset the amount of capital required to participate in auctions. Since the trend at the FCC is to abandon the use of installment payment plans, bidding credits will become an even more important tool for allowing small businesses to reduce the costs associated with securing spectrum. By reducing the cost of spectrum, the

¹⁰ *Notice* Appendix B & C.

FCC will increase the likelihood that small businesses will be successful in building their LMS systems and in making LMS widely available to the general public.

In light of the above, Comtrak recommends that entities that fall into the small business category receive a bidding credit of 25%.¹² Entities that fall into the very small business category should receive a bidding credit of 35%.

C. Comtrak Urges The Commission To Give Small Businesses The Ability To Partition Their License Area And Disaggregate Their Spectrum

Comtrak agrees with the Commission's proposal to allow LMS licensees to partition their geographic license area and disaggregate portions of their spectrum.¹³ Partitioning and disaggregation will allow small business auction winners to customize their LMS systems in a manner that will best address their business plans. In addition, other small business entities that are not ready to participate in the upcoming LMS auction may still be able to enter the market by securing partitioned licenses or disaggregated spectrum. Both of these options lead to more involvement in the telecommunications industry by small businesses. Comtrak, therefore, believes that the Commission should adopt its own proposals.

Comtrak also agrees with the Commission that when a small business entity applies to partition its license or disaggregate spectrum, unjust enrichment rules must exist to ensure that entities that are not themselves small businesses cannot take indirect advantage of the FCC's small business incentives.¹⁴ Comtrak, therefore, recommends the following approach. If a small business entity transfers any part of its license rights to a similarly situated small

¹¹ Notice Appendix C (citing 13 C.F.R. § 121.201).

¹² See discussion *supra* at 4.

¹³ Notice ¶ 77.

¹⁴ *Id.* ¶ 78.

business entity, the FCC should find that its unjust enrichment rules do not apply. To the extent that the transfer involves an entity that does not qualify for a small business incentive or qualifies for a reduced incentive, the transferee must repay to the federal government a proportional amount of any bidding credit that the original auction winner was granted.

Comtrak recommends that the FCC follow the plan adopted for the 800 MHz SMR auction to determine the actual proportion of the bidding credit that must be refunded to the government. In that proceeding, the FCC established the following unjust enrichment scheme: If the license is transferred to a nonqualified entity during the first two years of the license term, 100% of the bidding credit is forfeited; 75% is forfeited for transfers in the third year, 50% in the fourth year and 25% in the fifth year.¹⁵

V. The Gross Revenues Of Affiliates With *De Jure* Or *De Facto* Control Over A Small Business Applicant May Be Attributed To The Applicant

Comtrak generally supports the idea that a third-party's gross revenues may be attributed to a small business applicant when the party exercises *de jure* or *de facto* control over the applicant. Where an entity truly has control over a small business applicant, the entity may be considered an affiliate of the applicant for purposes of determining eligibility for small business incentives. Comtrak's primary concern is that the standard of control adopted by the FCC reflect the fact that small businesses must raise capital from a variety of investors and that such investors and their affiliates do not necessarily exercise control over the small business applicant.

¹⁵ *In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No 93-144, *Second Report and Order*, ¶ 286 (released July 10, 1997).

Comtrak understands that passive investors, by definition, should not be classified as affiliates because they lack control. However, Comtrak has reviewed the FCC's definition of an "affiliate" in past FCC auction orders and has found the definition to be unclear. This is especially true when it comes to assessing whether an institutional investor and its affiliates should be considered affiliates of the small business applicant for purposes of attributing gross revenues. Comtrak, therefore, urges the Commission to establish a clear definition of what constitutes control, including examples of the kinds of financial investments that will cause an investor or its affiliates to become affiliates of the small business applicant.

VI. The Commission Must Initiate LMS Spectrum Auctions No Later Than Second Quarter 1998

Section 309(j) sets out four reasons that justify the use of competitive bidding – the rapid deployment of new technology, the efficient use of spectrum, promotion of competition and revenue generation for the public.¹⁶ All four of these goals will go unserved for purposes of LMS if the Commission delays holding the LMS auction.

In the LMS Report and Order released in February 1995, the Commission stated that spectrum for multilateration LMS systems could be allocated using auctions.¹⁷ If the Commission follows its stated plan to auction spectrum for LMS sometime during the first or second quarter of 1998, three years will have passed since the Commission stopped accepting applications for new multilateration LMS authorizations. In the meantime, businesses such as Comtrak have business plans, capital and employees waiting to support LMS systems. New

¹⁶ 47 U.S.C. § 309(j).

technology is left undeployed and spectrum sits idle or under-utilized. In the limited instances where the public is receiving LMS services, they are not deriving the cost and service quality benefits driven by competition. Finally, the public is deprived of auction revenue so long as the LMS auction is not held. The FCC's protracted freeze on accepting applications for new LMS services is not serving Congress's intent. As a result, Comtrak strongly urges the Commission to move forward immediately with LMS auctions.

More specifically, Comtrak believes that it is imperative that the FCC schedule the LMS auction before the end of 1997. The Commission will have had adequate time to review the comments and reply comments filed in this proceeding so as to be able to announce the schedule of the auction. As part of this announcement, Comtrak urges the Commission to set the LMS auction date for April 1998. This will provide adequate notice for all interested parties to secure financing and to develop their business and auction strategies. Comtrak believes that setting the auction date any later will be in direct contravention of Congress's intent and will cause significant harm to Comtrak and other businesses that have been waiting for years for this auction.

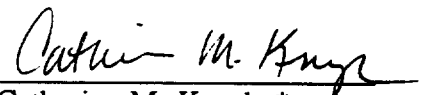
¹⁷ *In the Matter of Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, PR Docket No. 93-61, *Report and Order*, 10 FCC Rcd 4695, 4725-26 (1995).

VII. Conclusion

Comtrak suggests that the recommendations presented in these Comments are consistent with Congress's goals regarding the allocation of spectrum. Its recommendations will also ensure the positive treatment of small businesses mandated in the 1996 Act.

WHEREFORE, THE PREMISES CONSIDERED, Comtrak respectfully requests that the Commission act upon the LMS auction proposals raised in this rulemaking in a manner consistent with the views expressed herein.

COMTRAK



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November 5, 1997

Its Attorneys


*Admitted in California Only

CERTIFICATE OF SERVICE

I, hereby, certify that on this 5th day of November, 1997, I caused true and correct copies of the COMMENTS OF COMTRAK to be served via hand delivery on:

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MCDERMOTT, WILL & EMERY

September 15, 1998

Via Hand Delivery

Ms. Amy Zoslov, Chief
Auctions and Industry Analysis Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W. Room 5202
Washington, D.C. 20554

Re: Location and Monitoring Service Spectrum Auction Procedures

Dear Ms. Zoslov:

At the invitation of the Wireless Telecommunications Bureau ("WTB"), on September 14, 1998, Bruce Kessler, Director of Comtrak, along with counsel Catherine Krupka and Daniel Ball of McDermott, Will and Emery, met with the members of the WTB staff listed below and representatives of Teletrac, Inc. to discuss procedures for the upcoming Location and Monitoring Service ("LMS") auction. The discussion focused on the content of comments and reply comments filed by Comtrak and Teletrac in response to the Commission's Public Notice seeking comment on reserve prices and minimum opening bids (DA 98-1616) for the LMS auction.

As it did in its comments and reply comments, Comtrak advocated that the FCC reduce the minimum opening bid amounts for the LMS auction so that the initial bid figures reflect the unique nature of LMS. The reduction is justified because:

- LMS EA licensees must share spectrum with incumbent site-by-site LMS licensees, amateur radio operators, Part 15 device operators, ISM device operators, and governmental radiolocation and other services. As the number of Part 15 users continues to grow, the level and nature of the frequency sharing that LMS licensees must accommodate is not static or predictable. In order to accommodate these other users, LMS licensees may be required to deploy extra transmitters to achieve signal quality and coverage requirements, to relocate transmitters to avoid interference or to expend resources to locate interference sources with secondary status to LMS.

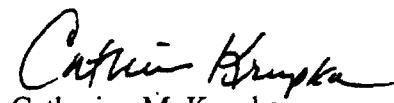
Ms. Amy Zoslov
September 15, 1998
Page 2

- The FCC has limited the approved uses for LMS licensed spectrum.
- LMS is a niche service that will be provided to smaller segments of the population, including fleet management, transportation and insurance companies. Consequently, the revenue generation potential for LMS is not closely tied with pure population statistics.
- LMS is not a substitute service for existing wireless services such as cellular, PCS or SMR. However, LMS licensees could face competition from these licensees due to the uses the FCC has approved for such services.
- LMS technology is highly customized. Systems must be constructed based not only on the geographic area to be served, but also based on the particular needs of a subscriber. Hardware and software may need to be developed based on individualized specifications.
- LMS operators must construct an entire system before they can begin to offer service. Therefore, during the initial part of a license period, an LMS operator may have no ability to generate revenues to help offset the costs of construction. LMS licensees, including small businesses, would like to be able to allocate a significant portion of their capital and other resources towards constructing and operating systems in as many EAs as possible.
- Operating an LMS system is resource intensive. Quality service is dependent upon the accuracy of data that changes frequently (e.g., due to construction, emergencies, interference and other activities that can affect location data).

For these reasons, Comtrak believes that the Commission's proposed minimum bid amounts do not accurately reflect a suitable minimum value of the LMS spectrum and must be reduced.

If you have any questions regarding the meeting or the contents of Comtrak's comments or replies, please do not hesitate to contact me at (202)756-8235.

Cordially yours,


Catherine M. Krupka

cc: Kenneth Burnley
Ben Freeman
Robert Reagle
Tim Salmon
Walter Strack

CERTIFICATE OF SERVICE

I, Jane Aguilard, hereby certify that on the 20th day of January, 1999, copies of the foregoing Comments of Comtrak were served by hand upon the parties listed below:

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